NEW YORK STATE COMMISSION ON CABLE TELEVISION

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December 4, 1992

Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: MM Docket No. 92-258

Dear Ms. Searcy:

I am enclosing herewith an original and nine copies of comments submitted by the New York State Commission on Cable Television in the above-referenced proceeding.

Very truly yours,

John L. Grow
Counsel

Encs.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Implementation of Section 10 of the Cable Television Consumer Protection nd Competition Act of 1992	)	
	)	MM Docket No. 92-258
Indecent Programming and Other Types of Materials on Cable Access Channels	)	

COMMENTS OF THE NEW YORK STATE COMMISSION ON CABLE TELEVISION

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on Cable Television
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Empire State Plaza
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COMMENTS OF THE NEW YORK STATE COMMISSION ON CABLE TELEVISION

1. The New York State Commission on Cable Television ("NYSCCT") respectfully submits initial comments in response to the Notice of Proposed Rulemaking ("NPRM") released in this docket November 10, 1992. NYSCCT is an independent Commission with broad authority to promote and oversee the development of the cable television industry in the State of New York. NYSCCT is expressly authorized by Section 815(6) of the Executive Law of the State of New York to represent the interests of the people of the State before the Federal Communications Commission ("Commission").

2. This rulemaking is commenced pursuant to Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"). The 1992 Act was enacted into law October 5, 1992. Section 10 entitled "Children's Protection from Indecent Programming on Leased Access Channels" amends Section 612 of the Cable Communications Policy Act of 1984 ("1984 Act") which requires the designation by cable operators of channel capacity for commercial use, i.e., leased access channels, and adds

provisions concerning the use of channel capacity designated for public, educational or governmental ("PEG") access. Section 10 also amends Section 638 of the 1984 Act in a manner that impacts both leased access and PEG access.

3. Section 10 of the 1992 Act requires the Commission to promulgate rules in two areas. First, the Commission is required to prescribe rules applicable to the provision of indecent programming on leased access channels in certain circumstances. Second, the statute requires the Commission to prescribe rules that would permit a cable operator to prohibit the distribution of certain programming on PEG access channels. NYSCCT is particularly concerned with the impact of the statutory changes and this rulemaking as they relate to PEG access. However, it will address each area in the same order as they are addressed in the NPRM.

LEASED ACCESS

4. Section 612(b) of the 1984 Act required cable operators to designate capacity for leased access depending upon the number of activated channels on the system. Section 612(c) precluded cable operators from exercising editorial control over the content of the programming on leased access channels except for the purpose of establishing a rate for the use of such channels.[1] No other provision of the 1984 Act empowered the cable operator unilaterally to consider the content of leased access programming.[2]

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[1] Section 9 of the 1992 Act empowers the Commission, inter alia, to determine the maximum reasonable rates that a cable operator may charge for leased access channels and, therefore, will appear to limit the practical significance of Section 612(c).

[2] Section 624(d) of the 1984 Act, although not referred to in Section 612, provides that: "Nothing in this title shall be construed as prohibiting a franchising authority and a cable operator from specifying in a franchise or renewal thereof, that certain cable services shall

5. Section 612(h) of the 1984 Act purported to empower franchising authorities to prohibit or limit the provision of certain programming on a cable system. Specifically, Section 612(h) provided that:

> "Any cable service offered pursuant to this section shall not be provided, or shall be provided subject to conditions, if such cable service in the judgment of the franchising authority is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution of the United States."[3]

As part of the statutory changes relevant to this rulemaking, Section 10 amends Section 612(h) in two different ways. First, it adds the words "or cable operator" after the term "franchising authority" and thereby purports to confer upon a cable operator the same rights as a franchising authority to prohibit or condition the provision of obscenity and other defined categories of programming. Section 10(b) further amends Section 612(h) by adding thereto a new sentence as follows:

> "This subsection shall permit a cable operator to enforce prospectively a written and published policy prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards."

[Footnote continued from page 2]:

not be provided or shall be provided subject to conditions, if such cable services are obscene or are otherwise unprotected by the Constitution of the United States." This section was not amended by the 1992 Act.

[3] Efforts by governmental entities to limit the provision of indecent programming on cable television systems have not been successful in the courts. (e.g., Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985)) Thus, it is unlikely that franchising authorities were encouraged by this section to attempt to prohibit or otherwise limit indecent programming.

These amendments to Section 612(h) are self-effectuating. Since the standard in the new last sentence, as noted by the Commission, is analogous to indecency as defined by the Commission for television broadcast programming and telephone communications, it now appears that Section 612(h) may be read as a whole to require cable operators to prohibit only obscene programming but to permit cable operators to act voluntarily to exclude indecent programming.

6. Although Section 612(h) does not require cable operators to prohibit indecent programming, Commission rules pursuant to Section 10(b) of the 1992 Act will require cable operators to take certain measures in respect to it. Section 10(b) adds a new subsection (j) to Section 612 which provides, in pertinent part, that:

> "The Commission shall promulgate regulations designed to limit the access of children to indecent programming, as defined by Commission regulations, and which cable operators have not voluntarily prohibited. . .by -
>
> (A) requiring cable operators to place on a single channel all indecent programs, as identified by program providers,. . .
>
> (B) requiring cable operators to block such single channel unless the subscriber requests access to such channel in writing; and
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> (C) requiring programmers to inform cable operators if the program would be indecent as defined by Commission regulations. . . ."

New subsection (j) differs from the amendments to Section 612(h) in two respects. First, Section 612(j) constitutes governmental action while it appears from the legislative history

that action by a cable operator pursuant to Section 612(h) is considered private action.[4] Second, Section 612(j) empowers the Commission to create a definition of indecency even as Section 612(h) defines indecency essentially as previously defined by the Commission in other contexts. Although it is not immediately apparent why Congress would create the possibility for separate definitions of indecency within a single statutory section applicable to leased access programming, the Commission cites the legislative history to suggest that the defined programming in the new subsection (j) is intended to be identical to indecency as defined by the Commission for other purposes.

7. Specifically, the Commission notes that its definitions of indecency for television broadcasting and telephone communications are tailored to each particular medium and, consistent therewith, it proposes to define indecency for purposes of both new Section 612(j) and amended Section 612(h) in reference to the cable medium. The Commission requests comment on this proposal. First, NYSCCT agrees that the proposal to coordinate the definitions for both subsections is warranted. Second, to the extent that a definition of indecency tailored to the cable television medium for purposes of Section 612(j) will help ensure that leased access programmers will not be subject to a different standard for their programming than other programmers of non-leased channels, such definition should be adopted by the Commission.[5] Third, the Commission should also

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[4] 138 CONG. REC. S646-S649 (daily ed. January 30, 1992).

[5] This is not to suggest that NYSCCT is necessarily in agreement with the notion that the same video programming delivered by cable and broadcast (or other communications technologies to the home) may be considered indecent on one medium but not on the other(s).

promote consistency in the area of indecency by adopting a standard that most closely approximates a standard that has already been upheld by the courts.

8. New Section 612(j) would require the leased access channel programmer to identify programming that is indecent. The Commission asks comments on whether this requirement prohibits the cable operator from making any independent judgment as to the indecency of leased access programming. In other words, must the cable operator rely exclusively on the statement by the programmer in placing leased access programming on a blocked or unblocked channel? Although such a construction is consistent with Section 612(j) and is probably the preferred result for both the cable operator and the programmer, it does result in an interesting contrast to the discretion available to the cable operator who acts under Section 612(h). Under Section 612(h), a cable operator who chooses voluntarily to prohibit all indecency may exercise complete discretion over each program so long as it publishes a written policy. This contrast is, perhaps, a good example of the inherent difficulty of reconciling all provisions of the 1984 Act, as amended, which are relevant to the Commission's mission in this proceeding.

9. The Commission asks whether cable operators can require certification by the programmer or program provider that programming is not obscene or indecent. Given the changes effected by Section 10 including, particularly, the removal of the cable operator's federal statutory immunity for liability for the transmission of obscene material,[6] the Commission should recognize that a cable operator can require a leased access programmer to certify that its material is not obscene. NYSCCT also believes that given

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[6] Infra, para. 14.

the balance of the new regulatory scheme pertaining to indecent programming on leased access channels that a cable operator should also be permitted to require a programmer to certify that its programming is not indecent. Whether the Commission should adopt detailed mandatory provisions governing the precise content of certifications is debatable. For example, it might be advisable for a certification to include more than a conclusory statement that the subject programming is, or is not, included within a defined category. Nonetheless, circumstances might vary considerably as between and among cable operators and programmers and it is perhaps sufficient at this time for the rules to recognize that cable operators may rely upon certifications without also specifying the precise form thereof.

10. The Commission notes that in order for a cable company to comply with a single channel requirement for all indecent leased access programming it must have reasonable advance notice from the programmer of indecent programming. The proposed rule would require that such notice be given "no later than seven days prior to the requested carriage of any programming." NYSCCT agrees that some notice is reasonable but submits that a single, fixed notice period for each program might, itself, constitute an unconstitutional burden on the right of leased access programmers to distribute, even indecent speech, and even on a blocked channel to those who request. In this regard, it is noted that the terms of leased access use generally include a specific channel or portion thereof for an extended period of time rather than a single date and time for a single program. Leased access use could also include live programming. In these circumstances, a certification could reasonably apply to a series of programs or to a forthcoming live programming. Accordingly, the Commission might consider a more general and flexible

notice period that is "reasonable, under the circumstances" and which may take into account the nature of the leased channel arrangement and whether the programming is entirely taped, entirely live or some combination of both.

11. The Commission asks whether a cable company without proper notice should be held harmless from liability under its rules and whether cable operators should be required to retain notifications. NYSCCT agrees that both proposals are sound and should be adopted. Simply by way of comparison, NYSCCT notes that its minimum standards applicable to the designation, use and administration of PEG access channels in the State of New York require the entity administering the PEG channels to retain for a period of two years the identity and responsibility for all programming carried on them. Since the maintenance of all programming information is in the self interest of the cable operator for a variety of reasons, the imposition of a retention period should not impose any undue burden on a cable operator.

12. Finally, in respect to commercial leased access, the Commission states its tentative conclusion that the changes set forth in Section 10 do not affect the requirement in Section 624(d)(2)(A) of the Cable Act of 1984 that:

> "[i]n order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber."

There is no apparent legislative intent to modify or to qualify this requirement and NYSCCT agrees with the Commission that it continues to apply as before.

PEG ACCESS

13. Section 611 of the 1984 Act recognized the authority of state and local franchising authorities to require the designation of channel capacity for PEG use. Section 611(e) specifically prohibited a cable operator from exercising any editorial control over PEG use "subject to Section 624(d)."[7] The 1992 Act does not amend Section 611 directly but it does impact PEG access in a potentially troublesome manner.

14. Section 10(c) pertains to PEG access only. Section 10(c) entitled "Prohibit System Use" provides as follows:

> "Within 180 days following the date of the enactment of this Act, the Federal Communications Commission shall promulgate such regulations as may be necessary to enable a cable operator of a cable system to prohibit the use, on such system, of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct."

Section 10(d) amends Section 638 of 1984 Act by removing the federal statutory immunity of cable operators for programming on PEG access channels and leased access channels that "involves obscene material."[8] These changes appear to be based primarily upon concern over commercial programming that has been distributed over leased access channels in the past.[9] NYSCCT fears that they will unnecessarily complicate the administration of all PEG channels and compromise the rights of the respective parties interested therein. Clearly, it

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[7] Supra., fn. 2.

[8] By statute in New York State, cable operators are both prohibited from programming decisions on PEG channels and immune from any liability for damages for obscene programming. N.Y.S. Executive Law, Sections 829, 830.

[9] See, 138 CONG. REC. S646-S649 (daily ed. January 30, 1992).

is inappropriate for cable operators to have even the potential for editorial control over educational and governmental uses which generally include only programming provided by educational and governmental entities. Nor should a cable operator be involved in programming decisions on public access channels or in any wise responsible for the content of public access programs. In this latter regard, the decision of Congress to remove cable operator's federal statutory immunity is particularly troublesome.[10]

15. Section 10(c) relative to PEG access may be readily contrasted with Section 10(a) and (b) concerning leased access in one significant respect. Section 10(c) is permissive only and does not require, as a matter of federal law, that a cable operator take any action based on programming content. This aspect of Section 10(c) is as it should be. PEG access channels are fundamentally local and intrastate in nature.

16. In the NPRM, the Commission proposes to track the language in Section 10(c) in its rules. NYSCCT is in essential agreement with the restraint exercised by the Commission in this delicate area. In footnote 11, the Commission refers to the legislative history concerning the categories of programming described in Section 10(c). In respect to the category, "sexually explicit conduct," the Commission suggests that "[t]he Senate drafters of this provision appear to have used the term programming involving 'sexually explicit conduct' to mean the same types of indecent programming material that may be prohibited by cable operators on leased access channels." NYSCCT also agrees with the Commission

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[10] This is not to suggest that the transmission of obscenity is lawful or should be protected but only that the individual or group that offers programming for transmission on a PEG channel on a cable system should be solely liable for any and all criminal or civil consequences of the programming content including obscenity.

that this conclusion appears to be supported by the discussion on the Senate floor. A clear statement by the Commission to the effect that "sexually explicit conduct" is tantamount to indecent programming should remove ambiguity about the nature of programming encompassed in this category. The legislative intent concerning the category, "material soliciting or promoting unlawful conduct" is less clear. Commission efforts to clarify this category should recognize that PEG channels are limited to noncommercial use.

17. Finally, the Commission raises the issue of certifications in the context of Section 10(c) and also asks whether specific procedures should be developed to govern disputes between the cable operator and the programmer of PEG channels. The Commission suggests that these disputes should be handled at the local level. NYSCCT is not persuaded, at this time, that the Commission should promulgate rules either on the certification of the content of PEG access programming or specific procedures for the resolution of PEG access disputes. NYSCCT does agree with the Commission that the resolution of such disputes is a non-federal matter.

Respectfully submitted,

NEW YORK STATE COMMISSION
ON CABLE TELEVISION

By:

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Dated: December 4, 1992
Albany, New York